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In The
Supreme Court of the United States

OCTOBER TERM, 1952

CLAYTON OCTAVE FOUQUETTE,
Petitioner,

vs.

ARTHUR E. BERNARD, WARDEN OF NEVADA STATE PRISON, *Respondent.*

No. 290, Misc.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF PRIOR PROCEEDINGS

Petitioner here seeks certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the order of the United States District Court for the District of Nevada denying petitioner's application for a Writ of Habeas Corpus. The order of the Circuit Court affirming the order and judgment of the lower court being entered August 21, 1952, as set forth in 198 Fed. 2d 860, Tr. 80.

Petitioner filed an application for a Writ of Habeas Corpus in the District Court on February 25, 1952, Honorable Edward P. Murphy, presiding judge. The petition was filed in that Court on the morning of that date. No service upon the respondent warden of the State Penitentiary was made until shortly before the convening of the hearing on that date, no order to show cause was secured or served. The respondent appeared at the hearing

upon notice of the clerk as to the time thereof with no knowledge of what he had to meet. See pages 30-45, Transcript of Proceedings in District Court. It is most clear from such transcript that Judge Murphy was well advised of the contents of the application for the writ and upon mature consideration determined there was no such showing therein that the applicant was entitled to the writ nor to the issuance of an order to show cause to the respondent, in brief, Judge Murphy expressed the opinion, and correctly so, that the applicant was seeking to convert the Writ of Habeas Corpus into a Writ of Error.

It is true Judge Murphy did issue a Writ of Probable Cause in order that the petitioner could take an appeal. He did so as follows:

Quoting from page 44 of transcript:

> MR. BONNER: I would like to move the Court, if the writ is to be denied, that certificate of probable cause be issued in order that we may take an appeal.
>
> THE COURT: Well, if I were to deny this writ and then issue a writ of probable cause, I would be going contrary to my own better judgment. I think this man received an abundantly fair trial. I may disagree with the verdict the jury reached as any man or claimant might, but it is not my province to interfere with that. Every opportunity has been afforded this man on State level as well as upon federal level to secure any relief to which he is lawfully and properly entitled. It has all been accorded and I think I will be merely burdening the Ninth Circuit with another one of these habeas corpus matters, of which we have literally hundreds. However, in view of the fact that a man's life is at stake, I will do it.

All right; let the record show that the petition heretofore filed and allowed to be filed in forma pauperis by the petitioner is denied. Will you prepare such an order, counsel?

MR. MATHEWS: Yes sir.

THE COURT: And will you prepare the certificate of probable cause?

MR. BONNER: Yes.

Thereafter, and on February 29, 1952, the petitioner as appellant in Clayton Octave Fouquette v. Arthur E. Bernard, Warden, etc., 198 Fed. 2d 96, Tr. 70, petitioned the Circuit Court of Appeals for the Ninth Circuit for a stay of execution theretofore entered in the State Court. The application for the stay was made ex parte and before the record in the lower court was filed in the Circuit Court, and without the transcript of the hearing in the lower court being submitted to Chief Judge Denman, who wrote the opinion upon the Application for a Stay of Execution. Upon the appeal being perfected in the Circuit Court the appellee filed a comprehensive brief in opposition to the contentions of the appellant.

Thereafter a hearing of the arguments on the appeal which resulted in the order of the United States District Court denying the application for a Writ of Habeas Corpus was affirmed. 198 Fed. 2d 860; Tr. 80, Chief Judge Denman writing the opinion. Surely the petitioner here, as petitioner in the District Court and as appellant in the Circuit Court, has been accorded every opportunity to sustain his right to a Writ of Habeas Corpus.

Further, in opposition to the granting of the writ of certiorari by this Court, we herewith submit in toto appellee's brief as filed in the United States Court of Appeals, Ninth Circuit, in Clayton Octave Fouquette, Appellant, v. Arthur E. Bernard, Warden of Nevada State Prison in Ormsby County, Nevada, Appellee, No. 13274, reported in 198 Fed. 2d 860; Tr. 80.

The chronological statement of prior proceedings in the State Courts and the United States Supreme Court, as set forth on

pages 8-9 of petitioner's brief, is substantially correct. However, we desire to here point out the nature of assignments upon which the petitioner here petitioned the Supreme Court of the United States for a Writ of Certiorari in case No. 438, Misc., October Term, 1950. Such assignments were:

> 1. Did the manner of taking confessions "N" and "O" and the admission of the same in evidence over defendant's objection constitute denial of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States?
>
> 2. Did the examination of petitioner by Dr. Philip Work at a time he was held without counsel and the subsequent introduction of the doctor's testimony over defendant's objection constitute a denial of due process of law, namely a denial of the right to counsel at all stages of the proceedings contrary to the Fourteenth Amendment.

This Court denied Certiorari in No. 438 on May 14, 1951. Tr. 2.

Thereafter the petitioner petitioned the Supreme Court of Nevada for a Writ of Habeas Corpus alleging therein that his imprisonment was illegal upon the grounds that he was insane on August 19, 1948, the date of the crime; that it was impossible for him to have a fair trial in Clark County in view of the prejudice and adverse publicity; and further, that certain confessions were admitted in evidence that were not legally admissible as voluntary confessions. The Supreme Court denied the Writ and dismissed the proceedings on July 5, 1951. In the Matter of the Application of Clayton Octave Fouquette for a Writ of Habeas Corpus, 233 P. 2d 859.

Following the denial of the Writ by the State Supreme Court, the petitioner again petitioned this Court for a Writ of Certiorari in case No. 156, Misc. October Term 1951, wherein he assigned the following questions as grounds upon which the Writ should issue:

1. Was the petitioner insane on August 19, 1948, when the alleged crime was committed?

2. Did the refusal of the Court to grant petitioner's motion for a change of venue requiring him to go to trial in a county wherein great prejudice generated by unfavorable newspaper publicity existed deny him life and liberty without due process of law?

3. Did the admission of confessions, Exhibits "N" and "O," over his objection, deny him life and liberty, without due process of law?

This Court denied the Writ, January 28, 1952. Tr. 2-3.

That all of the foregoing proceedings were had are admitted by petitioner. Tr. 17-22.

Errors Alleged By Petitioner in The United States District Court

The petition of the petitioner in the instant proceedings filed in the United States District Court is not clear as to the grounds upon which he relies for the issuance of the Writ of Habeas Corpus. Petition, Tr. 8-22. However, in his affidavit filed in support of the petition for the Writ he sets forth the following:

That petitioner has exhausted all available remedies in the State Courts.

That petitioner desires to prosecute said Habeas Corpus Petition in that he is illegally, and unlawfully detained, imprisoned and sentenced to death by Arthur E. Bernard, Warden of Nevada State Prison, and that the Eighth Judicial District Court of Clark County, State of Nevada, did not have jurisdiction to make and enter said sentence in that same was in violation of section 1 to the Fourteenth Amendment to the United States Constitution in this:

(a) That petitioner was insane on the date of the alleged crime.

(b) That petitioner had the right to bring witnesses from the State of California to testify in his behalf at the expense of the State.

(c) That notwithstanding sensational and prejudicial publicity against petitioner by Clark County newspapers, he was refused a change of venue and forced to go to trial at a time when because of prejudice and inflamed public opinion he was unable to obtain a fair trial before an impartial jury in Clark County, Nevada.

(d) That confessions were elicited from petitioner by threats, promises and reward or immunity which were involuntary and introduced against him over his objection.

(e) That Dr. Philip Work was allowed to interview him before the appointment of counsel and testify over petitioner's objection to all matters elicited from him.

(f) That petitioner was insane at the time of his trial and sentence.

Tr. 4-5.

The foregoing statement of grounds petitioner relied upon to secure a Writ of Habeas Corpus from the Federal District Court when analyzed and construed in conjunction with the decisions of the State Supreme Court, reported in 221 P.2d 404, considering the merits of the case in the trial court on appeal, and the decision of such court in 233 P.2d 859, wherein habeas corpus was denied, and further in considering such statement in connection with the matters submitted to the Supreme Court of the United States in petitions for Writs of Certiorari hereinabove shown, we submit that the petitioner was and is attempting to convert a proceeding in habeas corpus into an appeal for the purpose of reviewing alleged errors committed in the State Courts.

Habeas Corpus is not a writ of error. Neither can it be employed as a substitute for a writ of error. 25 Am. Jur. 162, sec. 28; McMicking v. Shields, 238 U.S. 99, 59 L.Ed. 1220.

Mere inconvenience cannot justify use of Writ of Habeas Corpus as a substitute for an appeal. Adams v. United States, 317 U.S. 269. Habeas Corpus cannot be made to perform the office of appeal or writ of error. Eagles v. U.S. ex rel Samuels, 329 U.S. 304, 91 L.Ed. 308; Charlie Wong v. Escola (C.C.A. 9), 6 F.2d 608; Petrai v. Archer (C.C.A. 9), 8 F.2d 354; Smith v. Johnson (C.C.A. 9), 83 F.2d 321.

The State Supreme Court adhered to the rule that habeas corpus is not a writ of error and cannot be used to authorize exercise of appellate jurisdiction, in denying the writ in the proceedings brought by Fouquette as reported in 233 P.2d 859.

The Presiding Judge of the District Court Committed No Error in Denying the Writ

The six alleged errors complained of by petitioner in his affidavit were, with the exception of assignment (f), that petitioner was insane at the time of his trial, expressly passed upon and decided adversely to him by the State Supreme Court in its opinion on the merits in 221 P.2d 404, and in its opinion on habeas corpus in 233 P.2d 859. The assignment of errors submitted to the State Supreme Court on appeal are set forth in petitioner's petition for Writ of Habeas Corpus in the instant proceeding at pages 13-17 of the Transcript of Record. The assignment of errors submitted to the State Court on habeas corpus are set forth in said transcript at pages 18-21 thereof and expressly stated in the Court's opinion in 233 P.2d 859.

It is to be noted that no assignment of error that the then defendant was insane at the time of the commission of the crime was incorporated in the assignment of errors lodged in the State Supreme Court upon the appeal from the judgment of the trial court. Neither was such question raised in the errors assigned against the trial court in denying the motion for a new trial. Tr. 16.

The question of the defendant being insane at the time of the commission of the crime was presented to the State Supreme Court

in the petition for Writ of Habeas Corpus. Tr. 18. It appears from the record in this Court that the question of the alleged insanity of the petitioner at the time of the trial was claimed by counsel to have been presented to the State Supreme Court and to the United States Supreme Court. The record concerning the question is set forth at pages 32-37 of the Transcript of Record. Whether or not the direct issue that the defendant was insane at the time of the trial was submitted to the trial court during the trial thereof, it clearly appears from the opinion of the State Supreme Court that such issue possesses no merit. The then defendant testified as to the alleged unvoluntariness of the confessions. Further he became a witness in his own behalf and testified substantially in accordance with the confessions. 221 P.2d at pages 418-420.

Insanity was interposed as a defense to the crime. The evidence of the insanity of the petitioner submitted to Judge Murphy and now of record in this Court consists of "Defendant's Exhibit 1" as listed on page 2 of petitioner's petition. This exhibit is the record of his commitment to the Patton State Hospital in California and introduced in evidence in the trial court. An examination of the exhibit will disclose that if the petitioner was ever insane, he still knew right from wrong and knew right from wrong at the time of the commission of the crime. His testifying in his own behalf at the trial substantially as he had confessed in writing is clearly indicative that he was far from being so insane as not to be responsible for his act.

The law governing the interposing of insanity as a defense in a criminal case was well established by the Supreme Court of Nevada in State of Nevada, Respondent, v. Lewis, Appellant, 20 Nev. 333, wherein, inter alia, the Court held:

> The instructions of the court to the effect that if the defendant has capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question and has knowledge and consciousness that the act he is doing is wrong and will deserve punish-

ment he is, in the eye of the law, of sound mind and memory and should be held responsible for his acts: Held correct.

The court instructed the jury that the defendant "is presumed to be sane until the contrary is shown, and a doubt upon this question alone should not acquit, for insanity is an affirmative proposition, and the burden of proving it is upon the defense." Held correct.

Later the State Court in State v. Nelson, 36 Nev. 403, reaffirmed its holding in the Lewis case, saying in part:

The rule adhered to by other courts, especially in English jurisdictions, was modified by the rule laid down by this court in the Lewis case, supra, in that it is not necessary that insanity be established beyond a reasonable doubt; but, insanity being an affirmative proposition, the burden of proving it is upon the defense, and he is required to establish his insanity by a preponderance of evidence. The instruction complained of in the case under consideration is one very similar to the instruction dwelt upon in the Lewis case, supra, and the general proposition of law therein contained was approved in that decision. We see no good reason at this time for changing the rule.

Before a conviction can be had in a criminal case, before a jury can be warranted in bringing in a verdict of conviction, regardless of what defense may be interposed, the law lays down a standard that they must be satisfied beyond a reasonable doubt of the truth of the charge in its entirety. (Rev. Laws, 7163.)

When a defense of insanity is interposed, proof of that defense is receivable by the trial court under the general rules of evidence applicable. It is for the jury, and not the judge, to say whether or not the defense is proven and the evidence of insanity, together with all

> the other facts and circumstances supported by the evidence in a case, go to the jury, and if the evidence as a whole, or any element of evidence, raises a reasonable doubt as to the guilt of the accused, he is entitled to the benefit of that doubt to the extent of an acquittal or reduction of degree.

The same rule has been applied by the Supreme Court of the United States in Fisher v. United States, 328 U.S. 463, wherein it stated the rule applicable to Federal Courts where the defense of insanity is interposed in murder cases, thus: One who knows right from wrong and whose will is capable of controlling his impulses is criminally responsible for his acts. It further appears in the Fisher case that it was most reluctant to interfere in the enforcement of the Federal Criminal Law in the courts of the District of Columbia, saying in part: "The administration of criminal law in matters not affected by Constitutional limitations or a general federal law is a matter peculiarly of local concern. Compare McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819, with Ashcraft v. Tennessee, 322 U.S. 143, 156, 88 L.Ed. 1192. * * * The policy of deferring to the District's courts on local law matters is reinforced here by the fact that the local law now challenged is long established and deeply rooted in the District."

Likewise the local law of Nevada governing the interposing of the defense of insanity has been long established and deeply rooted in its jurisprudence.

Notwithstanding that the defense of insanity as of the date of the commission of the crime was interposed by the petitioner upon his trial, he became a witness in his own behalf. Under the law of Nevada he was then and there deemed a competent witness. Section 10959, N.C.L. 1929, in effect at the time of trial, and in effect many, many, years prior thereto, provided:

> In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crime or offenses, the person so charged shall,

> at his own request, but not otherwise, be deemed a competent witness, the credit to be given his testimony being left solely to the jury, under the instructions of the court; provided, that no special instruction shall be given relating exclusively to the testimony of the defendant, or particularly directing the attention of the jury to the defendant's testimony.

Section 10960, N.C.L. 1929, provides:

> Nothing herein contained shall be construed as compelling any such person to testify. No instruction shall be given relative to the failure of the person charged with the commission of crime or offense to testify, except, upon the request of the person so charged, the court shall instruct the jury that, in accordance with a right guaranteed by the constitution, no person can be compelled, in a criminal action, to be a witness against himself.

In Buchalter v. New York, 319 U.S. at page 430, the Court said:

> But the (14th) amendment does not draw to itself the provisions of State Constitutions or State laws. It leaves the States free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this Court every ruling made in the course of a trial in a State court.

The State trial court in the instant case was the trier of the facts. On such court was lodged the duty, as well as the burden, of deciding the admissibility of evidence. The question of the sanity or insanity of the defendant was submitted to the jury as it was for the jury and not the judge to say whether or not the defense of insanity is proven. State v. Nelson, 36 Nev. 403. Such being the status of the matter, we think the Court in Akins v. Texas, 325 U.S. at pages 401-402, well said:

Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, Norris v. Alabama, 294 U.S. 587, 589, 590, 79 L.Ed. 1074, 1076, 1077, 55 S.Ct. 579; Smith v. Texas, 311 U.S. 128, 130, 85 L.Ed. 84, 86, 61 S.Ct. 164, we accord in that examination great respect to the conclusions of the state judiciary, Pierre v. Louisiana, 306 U.S. 354, 358, 83 L.Ed. 757, 760, 59 S.Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues "unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process."

Right to Witnesses

Petitioner assigns as error herein that he was denied the right to bring witnesses from the State of California to testify in his behalf at State expense. Surely this question presents no right guaranteed by the Fourteenth Amendment. However that may be, the record is clear that the trial court permitted the defendant to bring four witnesses from California at the expense of Clark County, but denied defendant's motion to bring two additional witnesses from that State at public expense upon the ground that the testimony of both as shown by their affidavits upon which the motion was based was incompetent and immaterial. 221 P.2d., pages 409-410.

Change of Venue

Petitioner next assigns as error the proposition that the trial court did not have jurisdiction to enter its judgment in that it refused petitioner a change of venue in violation of his right thereto under the Fourteenth Amendment because of the prejudice and inflamed public opinion he was unable to obtain a fair trial before an impartial jury.

The complete answer to this assignment is found in the State Supreme Court's opinion at 221 P.2d, pages 410-411.

It is most clear that the trial judge denied the motion for change of venue in the first instance without prejudice for the then defendant to renew his motion thereafter if it was found that a fair and impartial jury could not be obtained. It most clearly appears that upon the trial that a jury, including one alternate juror, was impaneled and sworn after the examination of only thirty-four veniremen, the allowance of only eleven challenges for implied bias, four of which resulted from challenges by the state, and retention by the defendant of two unused peremptory challenges, and without any renewal by defendant of his motion for change of venue. By failure to renew such motion defendant thereby waived his right to later object to the denial of his motion. The decision in the case rested upon the law of the State having its inception in State v. Millain, 3 Nev. 409, decided in 1867. In that case Millain was indicted for murder in Virginia City. Public feeling and resentment was most prevalent. A motion for change of venue was made predicated on affidavit showing extreme antipathy toward him. Also, many articles detrimental to the defendant appeared in the newspapers, much the same as in the instant case. The trial court denied the motion for the time being and proceeded to secure a jury. The State Supreme Court sustained the ruling of the trial court, holding:

> The action of the lower court in granting or refusing a change of venue is a matter of judicial discretion. If that discretion is abused it becomes the duty of an appellate court to afford relief.

Where a defendant on his motion for a change of venue showed a state of facts strongly tending to the conclusion that he could not obtain a fair jury, it was not error in the court to withhold its decision upon the motion until an examination was had of the jurors then in attendance and being satisfied from such examination that a fair jury could be obtained, to refuse to make the order for change of venue.

In reaching the foregoing conclusions, the Court in part said at pages 431-432:

> Besides these affidavits, the district attorney admitted the following facts, to be acted upon by the court as if proved by proper affidavit: "That the Gold Hill News, the Virginia Daily Trespass, and the Daily Territorial Enterprise, were three newspapers, printed and published daily in Storey county, Nevada, and of general and universal circulation in said county; that in each of said papers had been heretofore printed and published full and particular details of the murder of Julia Bulette; also of the arrest of defendant, charged with the commission of said murder; also full reports of the finding of the goods of deceased in the possession of this defendant, and the recognition of defendant, when in custody, by several citizens, as being the person who had at various times offered to sell to said persons articles of clothing and jewelry recognized as being property of deceased. Also, in said papers, the statements had been printed and published that the defendant, after his arrest, and when confronted with the goods of deceased, had voluntarily admitted to one Edwards, chief of police, that he was guilty of said crime of murder. Also a statement of the evidence adduced on the examination of defendant had been by

said papers published and circulated generally throughout the county of Storey, and read by the citizens thereof."

The court, on this showing, overruled the motion of defendant, for the time being, but made the following remarks:

"When overruling said motion the court informed counsel that having a large number of jurors in attendance, he would first attempt to empanel a jury; and if from examination of jurors he found that such a bias existed against defendant as to render it quite difficult to obtain a jury, that he would then allow counsel to renew his motion and then would grant it."

The court finally proceeded to trial without a change of venue, and we are to presume that it was satisfied, from an examination of the jurors in attendance, that a fair and impartial trial could be had in Storey county.

Petitioner, at page 10 of his brief, relies upon Shepard v. Florida, 341 U.S. 50-55, 95 L.Ed. 740, as the authority sustaining his position with respect to the alleged prejudicial newspaper reports and the denial of his motion for change of venue. The case relates to rape of a seventeen-year-old white girl by four Negroes in a State where no doubt race prejudice is most prevalent. The Court in reversing the judgment did so in a terse decision reading:

> *Per Curiam:* The Judgment is reversed. Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839.

The Cassell case was reversed upon the ground that a Negro is denied the equal protection of the laws when he is indicted by a grand jury from which Negroes as a race have been intentionally excluded. It is clear that the Shepard case was not reversed for the reasons stated in the opinion of Justice Jackson and Justice Frankfurter concurring in the result.

In Stroble v. State of California, No. 373, decided April 7, 1952, and reported in 72 S.C. 599, Adv.Op., the Supreme Court affirmed the judgment of the California Supreme Court where the death sentence was imposed upon Stroble for the sex murder of a little girl. It appears upon the arrest of Stroble and subsequent there was a spate of newspaper publicity of highly inflammatory nature. The Supreme Court in passing upon this phase of the case said:

> The matter of prejudicial newspaper accounts was first brought to the trial court's attention after petitioner's conviction, as one of the grounds in support of a motion for a new trial. At that time petitioner's present attorney urged that petitioner had been "deprived of the presumption of innocence by the premature release by the District Attorney's office of the details of the confession," and offered in support of that allegation certain Los Angeles newspapers published at the time for petitioner's arrest. The trial court replied as follows:
>
> "The jurors were all thoroughly examined and all definitely stated that they would give to the defendant the benefit of the presumption of innocence * * *. There is nothing to show those jurors ever saw those papers or ever read those papers. They were fully examined so far as defense counsel desired as to any knowledge or information they might have of the case."
>
> Petitioner does not challenge this statement of the court. Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately

six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury.

The Confessions

The confessions, two in number, being Exhibits "N" and "O," are alleged by petitioner to have been elicited from petitioner by threats, promises and reward or immunity, which were involuntary and introduced against him over his objections.

Again we turn to the opinion of the State Supreme Court at 221 P.2d, pages 418-420, wherein it clearly appears that the defendant testified in the absence of the jury as to inducements, threats of injury, promises, etc. Contradictory testimony of other witnesses present at the time of the taking of the confessions was also had. The trial court thereupon ruled that confessions were voluntarily given. The jury was then recalled, the confessions were admitted in evidence, and, *without objection on the part of petitioner's counsel but with his express consent, entered in the record*, and the testimony taken in the absence of the jury, to determine the admissibility of the confessions was read to the jury; and the court submitted the issue of the voluntariness of the confessions to the jury in a proper instruction. The State Court further said:

> Moreover, even if the court erred in admitting in evidence the written confessions, appellant was not prejudiced thereby, for the reason that he became a witness in his own behalf, and testified substantially in accordance with the confessions. State v. Johnny, 29 Nev. 203, 219, 87 P. 3; State v. Williams, supra, 31 Nev. 360, 367, 102 P. 974; State v. Urie, 35 Nev. 268, 274, 129 P. 305; State v. Williams, 67 Nev. 373, 219, P.2nd 184, 189.

Counsel for petitioner relies upon Lisenba v. California, 314 U.S. 219, 86 L.Ed. 166, and kindred cases cited on page 13 of petitioner's brief, as sustaining petitioner's contention with respect to the admissibility of the confessions. However, the State Court at pages 419-420 of 221 P.2d stated its position with respect to the admissibility of the confessions, based upon the proposition that this State follows the majority rule in State Courts and not the "civilized standards" rule for the guidance of Federal officers and Federal Courts as pronounced in McNabb v. United States, 318 U.S. 332. The Fourteenth Amendment leaves a State free to adopt by statute or decision such tests of the voluntariness of a confession of guilt as it may elect, whether or not they conform to those employed in Federal or other State Courts. Lisenba v. California, 314 U.S. 219, 86 L.Ed. 166; Ward v. Texas, 316 U.S. 547.

Re Dr. Work

It is assigned as error that Dr. Philip Work was allowed to interview petitioner before appointment of counsel and to testify over petitioner's objection as to matters elicited from him.

We submit there is no merit in this contention of petitioner. It is most clear that the State Supreme Court carefully examined this phase of the case. Its findings and conclusions thereon are fully set forth at pages 420-421, 221 P.2d. The weight of authority sustains the Nevada decision. State v. Nelson, 92 P.2d 182, where many cases are collated; 22 C.J.S. 998, sec. 651. There is no evidence in the record before this Court that the then defendant did not consent to the examination. To the contrary, at the very least, a strong inference that he did consent thereto appears from the following language in the State Court's opinion:

> And where, as in this case, insanity is interposed as a defense, an examination of accused by an expert medical witness, for the purpose of determining his mental condition, consented to by the accused, and the admission in evidence of the expert's findings with respect

thereto, does not violate the constitutional privilege of accused not to be a witness against himself. State v. Petty, 32 Nev. 384, 387-391, 108 P. 934, Ann. Cas. 1912D, 223; People v. Krauser, 315 Ill. 485, 146 N.E. 593, 598-601; State v. Nelson, 162 Or. 430, 92 P.2d 182, 189; 22 C.J.S., Criminal Law, page 998, sec. 651, notes 26-28.

Summation of Prior Proceedings

The record before this Court presents the following pertinent facts concerning prior proceedings had for and in behalf of the petitioner:

1. That he had a full and complete review of the judgment of conviction in the trial court by the State Supreme Court on the original appeal.

2. He has twice submitted the question of the taking of confessions "N" and "O" to the Supreme Court of the United States on certiorari and again submitted each question to the State Supreme Court on habeas corpus.

3. That he has submitted the question of the examination of Dr. Work to the Supreme Court of the United States on certiorari.

4. That he has twice submitted the question of denial of change of venue because of alleged prejudice and adverse publicity to the State Supreme Court on the original appeal, and later to the Supreme Court of the United States on certiorari.

5. That he did not raise or press the issue of being insane at the time of the commission of the crime on the original appeal in the State Court.

6. That he submitted the issue of such insanity on habeas corpus in the State Supreme Court, and later on certiorari to the Supreme Court of the United States.

We submit that all of the alleged errors complained of by petitioner here were well known to him and his counsel immediately on and after the trial of the case. That the record before this Court discloses a marked piecemeal attack of the judgment

of the State Courts. We think the Circuit Court of Appeals of the Second Circuit in United States ex rel McCann, 144 F.2d 604, well said of a Writ of Habeas Corpus: "Even this great writ can be abused and where the question has once been decided upon full consideration, there must be an end, else the Court becomes the puppet of any pertinacious convict."

But be that as it may, it is clear that the presiding District Judge herein was firmly convinced that the petitioner had been accorded every right in the State Courts to which he was entitled and that by reason thereof he was not entitled to the writ. We here direct this Court's attention to Transcript of Record of the actual proceedings in the lower court, being pages 30-45.

It is, we think, axiomatic that a judge of a United States District Court may exercise his discretion as to whether the Writ of Habeas Corpus shall issue and/or whether the petition therefor discloses matters of fact and/or of law requiring a hearing thereon.

Federal Court's jurisdiction to discharge prisoner, held for violation of State statute, is discretionary, and its jurisdiction should be exercised only in peculiarly urgent circumstances. Sander v. Johnston (C.C.A. 9), 11 F.2d 509. It was further held by this Court in the case, thus:

> It appears that appellant petitioned the Supreme Court of California for release on habeas corpus, and that his petition was denied without opinion on the 5th day of May, 1924. This latter circumstance was itself sufficient to justify the District Court in denying the petition in this case. Salinger v. Loisel, 44 S.Ct. 519, 265 U.S. 224, 232, 68 L.Ed. 989.

The Supreme Court of the United States has well said:

> Where the state courts have considered and adjudicated the merits of his (appellant's) contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily

reexamine upon writ of habeas corpus the questions thus adjudicated, Salinger v. Loisel, 265 U.S. 224. * * * Ex Parte Hawk, 321 U.S. 118, 88, L.Ed. 575.

This pronouncement of the Supreme Court was reiterated in House v. Mayo, 324 U.S. 42, 89 L.Ed. 1739, and White v. Regan, 324 U.S. 760, 89 L.Ed. 1348.

We respectfully submit that the writ of certiorari be denied.

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